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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR, PETITIONER

v.

NEIL MCELROY, A. TYLER PORT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

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In our memorandum on the petition for a writ of certiorari in this case, we stated (p. 5):

> We believe the Court should be informed that this case is now the subject of further review by the Departments of Defense and Justice, and within the near future administrative action thereon may be taken which could moot the case or materially alter the legal situation. In such eventuality the Court will, of course, be advised immediately.

It is the purpose of the present memorandum to advise the Court of further administrative action re-

cently taken which, in our view, renders this cause moot.

1. It will be helpful first to recall briefly the factual background as it existed when this latest administrative action was taken.

Between February 21, 1941, and September 11, 1956, petitioner, a tool and die maker (milling machine operator) with the Bell Aircraft Corporation, held a confidential security clearance granted by the Corporation in accordance with a security agreement then in effect between the Government and the Corporation (S. Ex. 3).[1] This clearance granted petitioner access to "confidential" defense information (*ibid.*). In order to utilize petitioner on a defense contract requiring clearance for access to "secret" defense security information, the Corporation, in the proper manner, requested petitioner's clearance for access to such information (*ibid.*).

On September 10, 1956, petitioner was advised by the Director of the Office of Industrial Personnel Security Review of the Department of Defense that his existing clearance had been suspended (S. Ex. 7). At the same time petitioner was presented with a detailed "Statement of Reasons" (S. Ex. 7) and was advised that he could reply thereto in writing under oath and submit affidavits by third parties and such other documentary evidence as he might desire in support of his answer (S. Ex. 7) He was further advised that he was entitled to a hearing on the

[1] The letter "S" refers to the Stipulation of Facts entered into by the parties.

"Statement of Reasons" at which he could appear by counsel, or in person, or in person with counsel, and present evidence in his own behalf including testimony and witnesses (*ibid.*). On September 11, 1956, petitioner's employment with Bell Aircraft was terminated by the Corporation (S. Ex. 8).

On November 1, 2 and 14, 1956, petitioner received a hearing in accordance with the provisions of the Industrial Personnel Security Review Regulation (20 Fed. Reg. 1553) (S., par. 12). On June 14, 1957, he was advised that, on the available information, the granting of clearance to him for access to classified defense information "is not clearly consistent with the interests of national security" (S. Ex. 14). At this time, Bell Aircraft was advised by the Director of the Office of Industrial Personnel Security Review that the decision in petitioner's case was not intended to prevent him from performing such nonclassified work as the Corporation might have available for him (S. Ex. 13).

On November 22, 1957, petitioner again set in motion the administrative processes of the Review Regulation (20 Fed. Reg. 1553) by requesting the respondent McElroy to reverse the June 14, 1957, determination (S. Ex. 15).

Upon receipt of the petitioner's request for reversal, the case was placed under review. Shortly thereafter, an investigation was instituted to obtain any additional information that might be available and of value in assisting the Defense Department to rule on petitioner's request of November 22, 1957 (S. Ex. 17). On April 17, 1958, the Court of Appeals decided the

case of *Greene* v. *McElroy*, 254 F. 2d 944, now pending in this Court on writ of certiorari granted October 27, 1958, No. 180, October Term, 1958.

On April 24, 1958—and despite the pendency of the administrative proceedings instituted at petitioner's request—petitioner instituted this suit in the District Court.

On May 30, 1958, respondent McElroy set aside the June 14, 1957 determination and ordered further proceedings conducted under the provisions of the aforementioned Review Regulation (S. Ex. 18). On June 19, 1958, petitioner was served with an Amended Statement of Reasons (S. Ex. 23). Petitioner replied thereto on June 25, 1958 (S. Ex. 24). Hearings thereon were held on July 11, 1958 (S., par. 30) and August 1, 1958 (S., par. 33). A final administrative determination having the effect of revoking confidential" and denying "secret" clearance to petitioner was made on October 13, 1958.

On October 14, 1958, the District Court ruled that the respondents were entitled to judgment as a matter of law under the "controlling ruling" of the *Greene* case, *supra* (Pet. App. 16–17).

On October 14, 1958, petitioner filed a notice of appeal in the Court of Appeals, and the record was docketed in that court on October 16, 1958. The petition for certiorari was filed on November 8, 1958, seeking review prior to the rendition of judgment in the Court of Appeals. The respondents' memorandum on the petition was filed on December 8, 1958. On December 15, 1958, this Court granted the petition and assigned the case for argument immediately preceding the *Greene* case.

2. As stated in our memorandum on the petition, the present case has been the subject of continuing administrative review by the Departments of Defense and Justice. This review has culminated in further administrative action taken on December 31, 1958, which is reflected in the documents reproduced in the Appendix, *infra*, pp. 12–18. In summary, the Acting Secretary of Defense, on that date, signed a Finding and Order in which he found that "the requested clearance of Charles Allen Taylor is in the national interest and I so order, hereby superseding all previous orders in this case" (App., *infra*, p. 12). On the same date, the Defense Department, by letter, advised petitioner (App., *infra*, pp. 12–13), his counsel (App., *infra*, p. 14), the Commander of the Air Material Command (App., *infra*, pp. 15–16), and the Bell Aircraft Corporation (App., *infra*, pp. 16–17) that this determination had been made and that all previous determinations in petitioner's case were thereby superseded. As indicated in the General Counsel's letter of January 6, 1959, to petitioner's counsel (also set forth in the Appendix, *infra*, pp. 17-18), this determination by the Acting Secretary on December 31st expunged all previous findings in the case.[a]

3. This administrative action of December 31, 1958, clearly renders the case moot. Petitioner's suit challenges the prior administrative determination of October 13, 1958 (*supra*, p. 4), that his clearance

[a] A copy of the General Counsel's letter of January 6th has been sent to petitioner, the Air Material Command, and the Bell Aircraft Corporation.

for "confidential" defense information should be revoked and that the requested clearance for "secret" defense information should be denied.[2] This determination has now been completely superseded and expunged. In its place, petitioner has been granted the very clearance he seeks.[3] In addition, the prior findings have been expunged.

The ultimate relief which might be sought in this litigation (but was not in fact sought), *i. e.*, a determination of eligibility for access to classified defense information, has been afforded petitioner by the new administrative order. No further relief from the respondents is available, or can be granted to petitioner in this proceeding. His complaint has been fully answered. Actually, success in the present litigation

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[2] The petition for certiorari characterizes this suit as "seeking a review of the denial of his clearance without confrontation by his accusers" (Pet. 7).

The prayer for relief in petitioner's complaint in the District Court is as follows:

"1. That this Court declare that plaintiff is entitled to a full and fair hearing before defendants or their agents upon the charges against nim, at which hearing he is given opportunity to be confronted with the witnesses and the evidence upon which the charges are based.

"2. That this Court declare that the determination of June 14, 1957 denying plaintiff access to classified defense information was in violation of his rights under the Fifth Amendment to the Constitution of the United States.

"3. That the defendants Neil McElroy and A. Tyler Port be restrained from enforcing the determination of June 14, 1957, denying plaintiff access to classified defense information and that said denial be reversed, rescinded and annulled.

"4. That plaintiff have such and further relief as to the Court may seem just and proper."

[3] Clearance for "secret" defense information which has been accorded to petitioner also includes clearance for the lower level of "confidential" information.

would have given him nothing more than an overriding of the prior administrative determination (see footnote 2, *supra*); it would not itself have rendered him eligible for clearance. In that sense, the administrative determination of December 31st has given him more than he sought in this judicial proceeding.

This situation is not at all the same as if a private defendant had voluntarily ceased some challenged conduct alleged to be unlawful. In such a case, the mere cessation of the unlawful conduct does not moot the case, unless the likelihood of recurrence is too remote.[4] Here, on the other hand, the suit attacks, not merely some injurious conduct which may or may not recur, but a particular official administrative order; and that order has now been superseded and expunged, and a contrary order substituted. In those and comparable circumstances, this Court has consistently held that the cause (which necessarily takes its vitality from the existence of the order) becomes moot, that no case or controversy remains to be resolved, and that the federal courts whose competence depends on the existence of a controversy over the order have nothing further on which to operate. See *Association of Lithuanian Workers* v. *Brownell*, 355 U. S. 23 (designation under the Attorney General's "subversive list"); *United States* v. *Amarillo-Borger Express, Inc.*, 352 U. S. 1028 (I. C. C. order); *Atchison, Topeka*

[4] *E. g.*, *United States* v. *W. T. Grant Co.*, 345 U. S. 629; *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945.

& Santa Fe Ry. Co. v. *Dixie Carriers,* 355 U. S. 179 (same); *Garcia* v. *Landon,* 348 U. S. 866 (deportation order); *Jew Sing* v. *Barber,* 350 U. S. 898 (exclusion order); *Klig* v. *Rogers,* 355 U. S. 605 (deporation order); *Howard* v. *United States,* 340 U. S. 898 (expiration of grand jury in civil contempt case); *American Public Power Association* v. *Power Authority,* 355 U. S. 64 (superseding federal power legislation); *National Association for the Advancement of Colored People, Inc.* v. *Committee on Offenses,* 358 U. S. 40 (expiration of state legislative committee); *McKay* v. *Clackamas County,* 349 U. S. 909 (superseding legislation); *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 115–116 (superseding legislation); *Bracken* v. *Securities & Exchange Comm'n.,* 299 U. S. 504 (withdrawal of an administrative subpoena); *Montgomery Ward & Co.* v. *United States,* 326 U. S. 690 (return of seized property); *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360 (same); *Cozart* v. *Wilson,* 353 U. S. 884 (release from official custody); cf. *United States ex rel. Norwegian Nitrogen Products Co.* v. *U. S. Tariff Commission,* 274 U. S. 106, 111–112.

4. The only possible basis upon which petitioner could still seek declaratory or injunctive relief is his desire for an adjudication that the prior action taken by the Government, which has since been superseded and expunged, was illegal. But wholly apart from the merits of this contention, this would amount to a request for a declaration that he had been wrongfully deprived of something which has recently been given to him. It is elementary that this Court will not declare abstract legal rights or wrongs and that a "case or con-

troversy" does not exist when a litigant "has obtained everything that [he] could recover in this case by a judgment of this court in [his] favor." *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314. And in *Brownlow* v. *Schwartz*, 261 U. S. 216, 217, the Court said:

> This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other.

In the petition for certiorari, petitioner emphasized that the record in this case would provide material illumination and amplification of the "confrontation" issue already pending before the Court in the *Greene* case (Pet. 12–15). Even if this were true, it is no basis for this Court to decide the issue as to Taylor when a decree of this Court against the respondents could accomplish no more for him than has already been afforded by the respondents under the administrative determination. The value of a case as a precedent or its effect on similar issues raised in other cases does not alter the fact of mootness. In *California* v. *San Pablo & Tulare R. R. Co.*, *supra*, the Court declared (p. 314):

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it.

> When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. * * *

5. In connection with the recent administrative action in this case, we take the opportunity to note that:—

(*a*) the *Greene* case is still pending and will present to the Court the general validity of the Industrial Security Program of the Defense Department;

(*b*) the Defense Department is currently undertaking a review of that Program in ways bearing directly on the problem presented by cases similar to petitioner's (see the Acting Secretary's memorandum for the Assistant Secretary of Defense, set forth in the Appendix, *infra*, pp. 18; this directive was issued the same day as the Acting Secretary issued his Finding and Order in petitioner's case); and

(*c*) several of the factors which petitioner stresses in his petition for certiorari as bearing on the problem of due process and judicial review likewise have a direct bearing on the administrative problem of whether petitioner should, as an administrative matter, be accorded a clearance; administrators continue to have their own obligations and responsibilities whether or not there is or can be judicial review or legal remedies in this field (and whatever the scope of judicial review if it is available).

CONCLUSION

Accordingly, we respectfully suggest that, in line with established practice and in the light of the suggestion made here, the judgment of the District Court be vacated and the case be remanded to that court with directions to dismiss the complaint on the ground that the case is now moot. See the cases cited *supra;* also, *e. g., United States* v. *Munsingwear,* 340 U. S. 36, 39–40; *Brotherhood of Locomotive Firemen and Enginemen* v. *United States,* 343 U. S. 971; *Los Angeles Building & Construction Trades Council* v. *Le Baron,* 342 U. S. 802; *Sawyer* v. *Dollar,* 344 U. S. 806; *Leader* v. *Apex Hosiery Co.,* 302 U. S. 656; *Harris* v. *Battle,* 348 U. S. 803; *Gunaca* v. *National Labor Relations Board,* 353 U. S. 902; *Ford* v. *United States,* 355 U. S. 38.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JANUARY 1959.

APPENDIX

THE SECRETARY OF DEFENSE
Washington

DECEMBER 31, 1958.

FINDING AND ORDER

Subject: Bell Aircraft Application for Security Clearance for Charles Allen Taylor—Case No. OSD 56-196

After review of the subject application, and in consideration of all the facts and circumstances developed in this case, I hereby find that the requested clearance of Charles Allen Taylor is in the national interest and I so order, hereby superseding all previous orders in this case.

/s/ DONALD A. QUARLES, *Acting.*

OFFICE OF THE SECRETARY OF DEFENSE
Washington 25, D. C.

DECEMBER 31, 1958.

Mr. CHARLES ALLEN TAYLOR,
269 Wheatfield Road,
North Tonawanda, New York.

DEAR MR. TAYLOR: Pursuant to the provisions of Department of Defense Directive 5220.6, dated February 2, 1955, this Department has considered the matter of your personnel security clearance for access to Secret defense information at Bell Aircraft Corporation, Buffalo, New York.

By letters dated September 10, 1956, and June 14, 1957, you were informed, first, that your then existing security clearance should be suspended, and second, that after considering all the available information, it had been determined that the granting of clearance to you for access to classified defense information was not clearly consistent with the interests of national security.

Thereafter, by letter dated June 19, 1958, from the New York Industrial Personnel Security Hearing Board and by letter from this Office dated October 13, 1958, you were informed, first, that your case had been returned to the New York Hearing Board for further proceedings, and, second, that after considering all the available information, it had been determined that the granting of clearance to you for access to classified defense information was not clearly consistent with the interests of national security.

Subsequent to October 13, 1958, your case was subject to further consideration by this Department. It has now been determined by the Secretary of Defense that the granting of clearance to you for access to Secret defense information is in the national interest. This determination supersedes all previous determinations made in your case.

By separate letter this Office has informed your attorney, Mr. Joseph L. Rauh, Jr., of this decision.

Very truly yours,

A. Tyler Port,

A. TYLER PORT,

Director, Office of Industrial Personnel Security Review.

OFFICE OF THE SECRETARY OF DEFENSE

Washington 25, D. C.

DECEMBER 31, 1958.

JOSEPH L. RAUH, JR., ESQUIRE,
Rauh & Levy,
1631 K Street NW., Washington 6, D. C.

DEAR MR. RAUH: Reference is made to my letter to you dated October 13, 1958, in which I notified you of the determination of the New York Industrial Personnel Security Hearing Board following its further hearing in this case on July 11 and August 1, 1958.

This case has been the subject of review and further consideration in the Office of the Secretary of Defense. You are hereby advised that the Secretary of Defense, after considering all the available information, has determined that the granting of clearance to Mr. Charles Allen Taylor for access to Secret defense information is in the national interest.

This determination supersedes all previous determinations made in Mr. Taylor's case.

Very truly yours,

/s/ A. Tyler Port,
A. TYLER PORT,
Director, Office of Industrial Personnel Security Review.

OFFICE OF THE SECRETARY OF DEFENSE

Washington, D. C.

DECEMBER 31, 1958.

COMMANDER, AIR MATERIAL COMMAND,
Attn: MCID,
Wright-Patterson AFB, Ohio.

DEAR COMMANDER: Reference is made to the letters from this Office dated September 6, 1956, June 13, 1957, and October 13, 1958, concerning Mr. Charles Allen Taylor, a former employee of Bell Aircraft Corporation, Buffalo, New York, for whom a Secret clearance had been requested by that company.

The above-mentioned letters, respectively, informed you first, that any then existing security clearance of Mr. Taylor should be suspended; second, that after considering all the available information, it had been determined that the granting of clearance to Mr. Taylor for access to classified defense information was not clearly consistent with the interests of national security; and third, that the adverse determination had been set aside and further proceedings conducted, after which, after considering all the available information, it had been determined that the granting of clearance to Mr. Taylor for access to classified defense information was not clearly consistent with the interests of national security.

Subsequent to October 1958, Mr. Taylor's case was subject to further consideration by this Department. After considering all the available information, it has now been determined by the Secretary of Defense that the granting of clearance to Mr. Taylor for access to Secret defense information is in the national interest. This determination supersedes all previous determinations made in Mr. Taylor's case.

Evidence of record indicates that Mr. Taylor is no longer employed by the company that requested his clearance. Accordingly, no further action is required except appropriate annotation of your records.

Very truly yours,

/s/ A. Tyler Port,
A. Tyler Port,
Director, Office of Industrial Personnel Security Review.

Copy to:

1. USAF, Wash, DC, ATTN: AFUSI-6B
2. OpNav, SecBr, Wash, D. C.
3. ACofS, Intel, DA, Wash, DC
4. Central Index File

Office of the Secretary of Defense

Washington 25, D. C.

December 31, 1958.

Bell Aircraft Corporation,
Post Office Box # 1, Buffalo 5, New York.

Attention: Security Officer.

Gentlemen: Reference is made to the letters from this Office dated September 6, 1956, and June 13, 1957, concerning Mr. Charles Allen Taylor, a former employee for whom a Secret clearance had been requested by your company. By these letters you were informed, first, that any existing security clearance Mr. Taylor then had should be suspended, and second, that after considering all the available information, it had been determined that the granting of clearance to Charles Allen Taylor for access to classified defense information was not clearly consistent with the interests of national security.

Subsequent to June 1957, Mr. Taylor's case was subject to further consideration by this Department. After considering all the available information, it has now been determined that the granting of clearance to Mr. Taylor for access to Secret defense information is in the national interest. This determination supersedes the one previously announced.

Very truly yours,

/s/ A. Tyler Port,
A. TYLER PORT,
Director,
Office of Industrial Personnel Security Review.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
Washington 25, D. C.

6 JANUARY 1959.

JOSEPH L. RAUH, JR., ESQ.,
c/o Rauh & Levy, Esquires,
1631 K Street NW., Washington 6, D. C.

DEAR MR. RAUH: I write at the direction of the Secretary of Defense to reply to your telegram of January 5, 1959, addressed to the Secretary in connection with the matter of the industrial security clearance of your client, Charles Allen Taylor.

The language of the order of December 31, 1958, which reads "* * * hereby superseding all previous orders in this case" completely expunges all previous findings in this case, as if they had never been rendered.

The Secretary, by his "Finding and Order" of December 31, 1958, has found that the requested clearance of Charles Allen Taylor should be granted.

Very sincerely,

(Signed) ROBERT DECHERT.

THE SECRETARY OF DEFENSE

Washington

DECEMBER 31, 1958

MEMORANDUM FOR THE ASSISTANT SECRETARY OF DEFENSE (MP&R)

Subject: Amendment of Industrial Personnel Security Review Regulation, Department of Defense Directive 5220.6, dated February 2, 1955.

The Industrial Personnel Security Review Regulation, as presently written, has been interpreted and administered so as to preclude a Board functioning under the Regulation from differentiating between levels of clearance when making a determination to grant, deny, or revoke a clearance.

I am advised that during the past several months the Office of Industrial Personnel Security Review has been making a comprehensive study of the Review Regulation in terms of its possible improvement, and that one of the particular aspects covered in this study is the matter of providing for Board determinations which specify the level of clearance to be granted.

Recent developments have underlined the desirability of revising the Review Regulation in order to permit the Boards established by it to consider not only the derogatory information in a particular case, but also the level of classified information at which access is sought, and to make a determination which takes that factor into account.

I consider it appropriate, therefore, that the portion of the Office of Industrial Personnel Security Review

study which relates to this matter be separated from the remainder and brought to completion as soon as practicable in order that necessary action may be taken to amend Department of Defense Directive 5220.6 accordingly.

DONALD A. QUARLES, *Acting.*

U. S. GOVERNMENT PRINTING OFFICE: 1959